

2010

Complaints Must Plead Non-Conclusory Facts That Manifest Plausibility to Survive a Motion to Dismiss in All Civil Cases: *Ashcroft v. Iqbal*

Carly R. Wilson

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Carly R. Wilson, *Complaints Must Plead Non-Conclusory Facts That Manifest Plausibility to Survive a Motion to Dismiss in All Civil Cases: Ashcroft v. Iqbal*, 48 Duq. L. Rev. 173 (2010).
Available at: <https://dsc.duq.edu/dlr/vol48/iss1/9>

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Complaints Must Plead Non-Conclusory Facts that Manifest Plausibility to Survive a Motion to Dismiss in All Civil Cases: *Ashcroft v. Iqbal*

CIVIL PROCEDURE—PLEADING—PLAUSIBILITY—FEDERAL RULE OF CIVIL PROCEDURE 8(A)(2)—FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6)—The United States Supreme Court held that to survive a motion to dismiss, *Bell Atlantic Corp. v. Twombly* mandates that complaints in all civil matters must plead enough factual matter that, if accepted as true, plausibly entitles the plaintiff to relief.

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

- I. THE FACTS OF *IQBAL* 174
- II. THE PROCEDURAL HISTORY OF *IQBAL* 176
- III. THE UNITED STATES SUPREME COURT OPINIONS IN *IQBAL* 177
 - A. Justice Kennedy’s Majority Opinion..... 177
 - B. Justice Souter’s Dissent 182
 - C. Justice Breyer’s Dissent 185
- IV. THE LEGISLATION AND PRECEDENT LEADING TO *IQBAL* 186
 - A. *The Federal Rules of Civil Procedure and Dioguardi v. Durning*..... 186
 - B. *The Fifty-Year-Reign of the “No Set of Facts” Rule: Conley v. Gibson*..... 187
 - C. *The Evolution of Rule 8: Papasan, Leatherman, and Swierkiewicz*..... 188
 - D. *The “Retirement” of Conley: Bell Atlantic Corp. v. Twombly*..... 191
 - 1. Justice Souter’s Majority Opinion 192
 - 2. Justice Stevens’ Dissent..... 194
- V. *IQBAL*: A CONFUSING, INCOMPLETE, AND OPPORTUNISTIC OPINION 194
 - A. *The Now-Impenetrable Motion to Dismiss*..... 194
 - B. *The Court Avoids the Qualified Immunity Defense . . . But Strongly Favors it Anyway*... 196
 - C. *The Answer to an Un-Asked Question*..... 197
 - D. *Uncertainty among the Justices* 197

I. THE FACTS OF *IQBAL*

In November of 2001, the Federal Bureau of Investigation and U.S. Immigration and Naturalization Service arrested Respondent Javaid Iqbal, a native of Pakistan and a Muslim.¹ The FBI named him a person of high interest in the inquiry regarding the September 11, 2001 terrorist attacks.² The FBI imprisoned all high-interest individuals, including Iqbal, in the Administrative Maximum Special Housing Unit ("ADMAX SHU") in the Brooklyn, New York Metropolitan Detention Center ("MDC").³ Iqbal pled guilty to fraud in relation to forging identification documents and conspiring to defraud the United States.⁴ After completing his sentence, he was deported to Pakistan.⁵

Iqbal contended that while detained in the ADMAX SHU, MDC employees brutally beat him, refused him medical care,⁶ conducted daily strip and body cavity searches,⁷ denied him food,⁸ disallowed him to contact defense counsel,⁹ interrupted his religious studies,¹⁰ taunted him,¹¹ left him outdoors in the rain,¹² and turned on his

1. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942-43 (2009).

2. *Iqbal*, 129 S. Ct. at 1943. After receiving over 96,000 tips, the FBI questioned over 1000 individuals, detaining 762 for immigration violations. *Id.* The FBI named each of the 184 prisoners of Arab descent and Islamic faith in New York City "of high interest"—including Iqbal. *Id.*

3. *Id.* at 1943. Prisoners in the ADMAX SHU (the most restrictive form of imprisonment permitted by the Bureau of Prisons) spend twenty-three hours a day in their cells. *Id.* ADMAX SHU inmates receive one hour of outdoors time, where they remain shackled and surrounded by four correctional officers. *Id.* Iqbal remained in the ADMAX SHU from January 8, 2002, until the conclusion of July 2002. *Iqbal v. Hasty*, 490 F.3d 143, 149 (2d Cir. 2007), *cert. granted*, 76 U.S.L.W. 3417 (2008) (No. 07-1015), *rev'd*, 129 S. Ct. 1937 (2009).

4. *Iqbal*, 129 S. Ct. at 1943 (citing *Hasty*, 490 F.3d at 147-48).

5. *Id.* at 1943.

6. *Hasty*, 490 F.3d at 149. Iqbal claimed two instances of beatings, once upon his arrival in the ADMAX SHU and two months later in March. *Id.* For two weeks after the second beating, Iqbal claimed to experience severe pain, yet the MDC presumptively denied him medical care. *Id.* During the beatings, MDC staff "kicked [Iqbal] in the stomach, punched him in the face, and dragged him across" the floor. *Iqbal*, 129 S. Ct. at 1944 (quoting First Amended Complaint and Jury Demand para. 113, *Elmaghraby v. Ashcroft*, No. 04-CV-01809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005), *aff'd*, 490 F.3d 143 (2d Cir. 2007), *cert. granted*, 76 U.S.L.W. 3417 (U.S. Jun 16, 2008) (No. 07-1015), *rev'd*, 129 S. Ct. 1937 (2009), 2004 WL 3756442 [hereinafter Complaint]).

7. *Hasty*, 490 F.3d at 149.

8. *Id.* Judge Newman wrote that during his captivity in the MDC, Iqbal purportedly lost over forty pounds. *Id.*

9. *Id.* If Iqbal voiced concerns over his treatment, officers severed the phone and withheld correspondence. *Id.*

10. *Id.* Iqbal was allowed to engage in neither daily nor Friday prayer, and MDC employees removed his Koran. *Id.*

11. *Id.* Iqbal asserted he was called a "Muslim killer" and "terrorist." *Id.*

air conditioning in the winter and heating in the summer.¹³ Pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*,¹⁴ Iqbal filed a complaint consisting of twenty-one causes of action against nineteen correctional officers and thirty-four federal officials, including the Petitioners: former Attorney General John D. Ashcroft and FBI Director Edward Mueller.¹⁵

Iqbal asserted that Ashcroft and Mueller violated his First and Fifth Amendment rights by identifying him as a person of high interest in the September 11, 2001 terrorist attacks on the basis that he was a Pakistani Muslim.¹⁶ Specifically, Iqbal implicated Mueller in the management of the FBI—whose agents imprisoned many other Arab Muslim men¹⁷—and both Ashcroft and Mueller in creating a policy that justified the keeping of detainees in the ADMAX SHU until the FBI could disprove a captive's links to terrorism.¹⁸ The complaint claimed that Ashcroft and Mueller intentionally placed detainees in the ADMAX SHU exclusively because they were Arab Muslim men.¹⁹

12. *Hasty*, 490 F.3d at 149. Iqbal purported that employees at the MDC activated the air conditioning in his cell after placing him outside in the rain “for hours.” *Id.*

13. *Id.*

14. 403 U.S. 388 (1971). In *Bivens*, plaintiff filed suit against federal narcotics agents who arrested him inside his home and in front of his family, alleging that agents made the arrest with neither probable cause nor a warrant. *Bivens*, 403 U.S. at 389. Both the district court and Second Circuit dismissed the suit for failure to state a claim upon which relief may be granted. *Id.* at 390. The Supreme Court reversed and held that a private citizen may recover money damages from a federal agent in violation of the Fourth Amendment. *Id.* at 397-98. The *Bivens* Court “recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.” *Iqbal*, 129 S. Ct. at 1947-48 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)).

15. *Iqbal*, 129 S. Ct. at 1943.

16. *Id.* at 1944.

17. *Id.* (citing Complaint, *supra* note 6, para. 47). The complaint stated that “[i]n the months after September 11, 2001, the [FBI], under the direction of [Petitioner] MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11.” Complaint, *supra* note 6, para. 47.

18. *Iqbal*, 129 S. Ct. at 1944 (citing Complaint, *supra* note 6, para. 69). The complaint claimed, “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by [Petitioners] ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.” Complaint, *supra* note 6, para. 69.

19. *Iqbal*, 129 S. Ct. at 1944 (citing Complaint, *supra* note 6, para. 96). Iqbal’s complaint alleged that “[Petitioners] ASHCROFT [and] MUELLER . . . each knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to these conditions of confinement as a matter of policy, solely on account of their religion, race, and/or national origin and for no legitimate penological interest.” Complaint, *supra* note 6, para. 96. Justice Kennedy also noted that Iqbal’s complaint labeled Ashcroft the “principal architect” of the discriminatory policy with Mueller as “instrumental in [the policy’s] adoption, promulgation, and implementation.” *Iqbal*, 129 S. Ct. at 1944 (citing Complaint, *supra* note 6, paras. 10, 11).

II. THE PROCEDURAL HISTORY OF *IQBAL*

After *Iqbal* filed his complaint in the U.S. District Court for the Eastern District of New York, Ashcroft and Mueller (as well as other defendants who did not appeal to the United States Supreme Court) moved to dismiss the complaint because it failed to plead sufficient facts to show that their own personal actions violated the Constitution.²⁰ The district court denied the motion to dismiss, citing the rule in *Conley v. Gibson*²¹ that a motion to dismiss should only be granted if no set of presumptively true facts would warrant relief to the pleader.²² While Ashcroft and Mueller filed an interlocutory appeal²³ pursuant to the collateral-order doctrine,²⁴ the United States Supreme Court overruled *Conley* in *Bell Atlantic Corp. v. Twombly*.²⁵

The Second Circuit Court of Appeals affirmed the district court's order denying the motion to dismiss.²⁶ It interpreted *Twombly* to mean that assertions made in a complaint must be plausible, and only those claims not plausible require further factual evidence to defeat a motion to dismiss.²⁷ In a concurring opinion, Judge Cabranes urged the United States Supreme Court to clarify the correct pleading standard for complaints in cases where government official defendants raise qualified immunity as a defense.²⁸

20. *Iqbal*, 129 S. Ct. at 1944. Ehab Elmaghraby originally filed suit as a co-plaintiff with *Iqbal*. *Hasty*, 490 F.3d at 147. Mr. Elmaghraby and the United States settled the suit for \$300,000. *Id.*

21. 355 U.S. 41 (1957).

22. *Iqbal*, 129 S. Ct. at 1944. The district court explained that, if the purported facts in *Iqbal*'s complaint were correct, "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" Ashcroft and Mueller. *Id.*

23. An interlocutory appeal is "[a]n appeal that occurs before the trial court's final ruling on the entire case." BLACK'S LAW DICTIONARY 113 (9th ed. 2009).

24. The collateral-order doctrine is a "doctrine allowing appeal from an interlocutory order that conclusively determines an issue wholly separate from the merits of the action and effectively unreviewable on appeal from a final judgment." *Id.* at 299.

25. *Iqbal*, 129 S. Ct. at 1944 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

26. *Id.* (citing *Hasty*, 490 F.3d at 174).

27. *Id.* (citing *Hasty*, 490 F.3d at 157-58). Federal Rule of Civil Procedure 8(a)(2) requires a complaint to assert "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

28. *Iqbal*, 129 S. Ct. at 1945 (citing *Hasty*, 490 F.3d at 179 (Cabranes, J., concurring)).

III. THE UNITED STATES SUPREME COURT OPINIONS IN *IQBAL*

The Supreme Court granted certiorari on two issues.²⁹ First, Ashcroft and Mueller labeled Iqbal's causes of action as legal conclusions and asked whether the complaint against them complied with Rule 8(a)(2) of the Federal Rules of Civil Procedure.³⁰ The second question presented by Ashcroft and Mueller asked whether they could be responsible for the unconstitutional conduct of subordinate government employees, presuming they had constructive notice of the behavior.³¹ Because the Court determined the first issue to be dispositive, it neither discussed nor answered the second question from a constructive notice perspective,³² but nevertheless concluded that Ashcroft and Mueller cannot be liable under *Bivens* for their subordinates' actions.³³

A. Justice Kennedy's Majority Opinion

Justice Kennedy delivered the opinion of the Court.³⁴ In a five-to-four majority, the Court reversed the district court's order denying the motion to dismiss.³⁵ The majority held that Iqbal's complaint contained insufficient factual matter to meet the plausibility standard of Rule 8(a)(2) established in *Twombly*.³⁶

Justice Kennedy began the Court's analysis by noting that although *Bivens* recognizes that federal officials may be liable to private citizens for their subordinates' unconstitutional conduct,³⁷

29. *Id.* at 1955-56 (Souter, J., dissenting). Only the dissent, not the majority, expressly mentioned the two specific issues granted on certiorari. *Id.* While the majority did not answer the second issue, the dissent remarks that it "*sua sponte* decide[d] the scope of supervisory liability." *Id.* at 1956.

30. *Id.* at 1955. In his dissent, Justice Souter noted that this question really probed whether the Second Circuit incorrectly interpreted and applied *Twombly* in deciding to affirm the order denying the motion to dismiss. *Id.* at 1956.

31. *Id.* at 1956 (Souter, J., dissenting).

32. *Id.* at 1937 (majority opinion).

33. *Iqbal*, 129 S. Ct. at 1949.

34. *Id.* at 1941 (majority opinion). Justice Kennedy wrote the majority opinion, which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. *Id.*

35. *Id.* at 1954

36. *Id.* Justice Kennedy wrote that Iqbal's "complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against [Ashcroft and Muller]." *Id.*

37. *Id.* at 1947-48 (citing *Malesko*, 534 U.S. at 66). The majority noted that *Bivens* actions are implied, and as a result, are not encouraged. *Iqbal*, 129 S. Ct. at 1948. The Court explained that it previously "declined to extend *Bivens*" to a First Amendment violation in *Bush v. Lucas*, 462 U.S. 367 (1983), and could have dismissed Iqbal's First Amendment-related cause of action for this reason. *Iqbal*, 129 S. Ct. at 1948. Because Ashcroft and Mueller failed to make this argument, however, the court "assume[s], without deciding, that [Iqbal]'s First Amendment claim is actionable under *Bivens*." *Id.*

Bivens actions may not be pursued on the basis of vicarious liability or respondeat superior.³⁸ The majority explained that the complaint must illustrate that both Ashcroft and Mueller personally breached Iqbal's rights under the Constitution.³⁹ To accomplish this, Justice Kennedy clarified that Iqbal must illustrate that Ashcroft and Mueller created and carried out the FBI policy of holding Arab Muslim men in the ADMAX SHU to discriminate against them based on their ethnicity or religious beliefs.⁴⁰

Iqbal challenged the majority's interpretation and suggested instead that if Ashcroft and Mueller knew and yet ignored such prejudicial imprisonment by their employees, they may be responsible based on "supervisory liability."⁴¹ The majority, however, reasoned that supervisory liability and vicarious liability are the same theory.⁴² Justice Kennedy explained that in First and Fifth Amendment *Bivens* actions, only the supervisor's personal discriminatory purpose creates the cause of action, and recognizing a supervisor's knowledge of a subordinate's prejudicial intent as actionable creates vicarious liability under respondeat superior.⁴³

The majority then discussed the sufficiency of Iqbal's complaint.⁴⁴ Justice Kennedy put forth two inherent factors from *Twombly*: (1) legal conclusions are not entitled to the presumption of truth, and (2) implausible claims for relief must be dismissed.⁴⁵ The Court mandated that facts accompany legal conclusion-based allegations.⁴⁶ By this reasoning, the majority disregarded Iqbal's

38. *Iqbal*, 129 S. Ct. at 1948. Vicarious liability is "[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties." BLACK'S LAW DICTIONARY, *supra* note 23, at 998. Respondeat superior is "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Id.* at 1426.

39. *Iqbal*, 129 S. Ct. at 1948. Justice Kennedy explained that he began by describing the elements "a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity," because the *Twombly* Court also began by listing elements of an antitrust dispute. *Id.* at 1947 (citing *Twombly*, 550 U.S. at 553-54).

40. *Id.* at 1948-49. First, the majority said that "the plaintiff must plead and prove that the defendant acted with a discriminatory purpose." *Id.* at 1948. Then, the Court defined the purpose as "adopt[ing] and implement[ing] the detention policies at issue not for a neutral investigative reason but for the purpose of discriminating on account of race, religion, or national origin." *Id.* at 1948-49.

41. *Id.* at 1949.

42. *Id.*

43. *Id.* (explaining that "Government official[s] . . . [are] only liable for his or her own misconduct" and "purpose rather than knowledge is required to impose *Bivens* liability").

44. *Iqbal*, 129 S. Ct. at 1949.

45. *Id.* at 1949-50.

46. *Id.* at 1950.

assertions that Ashcroft and Mueller detained him based on his ethnicity or religion, that Ashcroft created this procedure, and that Mueller implemented the policy.⁴⁷ Although Justice Kennedy recognized that the assertions might in fact have merit, he deemed the allegations legal conclusions, the veracity of which may never be assumed.⁴⁸

Next, the majority ascertained whether any of the remaining non-conclusory claims plausibly warranted relief for Iqbal.⁴⁹ The Court clarified that if another, more probable reason for a defendant's actions exists, a plaintiff's claim fails to meet *Twombly*'s plausibility standard.⁵⁰ To that effect, the Court noted that Iqbal's remaining claims included allegations that, while managed by Mueller, the FBI imprisoned other men based on their Middle Eastern heritage and Islamic faith, and that Ashcroft and Mueller endorsed a policy to detain these men in the ADMAX SHU until the FBI could disprove their involvement in terrorism.⁵¹

The majority concluded that these claims were not plausible.⁵² Justice Kennedy recognized that Iqbal's allegations, assuming their veracity, might have manifested discrimination by Ashcroft and Muller;⁵³ however, the emergent circumstances surrounding the September 11th attacks proved more persuasive to the Court.⁵⁴ The majority emphasized that Arab Muslim men masterminded and implemented the September 11th terrorist attack

47. *Id.* at 1950-51. The Court eliminated the assertions that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest,'" that "Ashcroft was the 'principal architect' of [the] invidious policy," and that "Mueller was 'instrumental' in adopting and executing [the policy]." *Id.* at 1951 (quoting Complaint, *supra* note 6, paras. 96, 10, 11).

48. *Iqbal*, 129 S. Ct. at 1951 (stating that the Court does "not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . [I]t is the conclusory nature of [the] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.").

49. *Id.* at 1950.

50. *Id.*

51. *Id.* at 1951. The remaining allegations the Court considered were that "the [FBI], under the direction of [Petitioner] MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11," and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by [Petitioners] ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.* (citing Complaint, *supra* note 6, paras. 47, 69).

52. *Id.* at 1950-51.

53. *Iqbal*, 129 S. Ct. at 1950. Justice Kennedy stated: "Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin." *Id.*

54. *Id.*

as members of an Islamic extremist group led by another Arab Muslim man, Osama bin Laden.⁵⁵ The Court stated that Ashcroft and Mueller, in their capacity as government officials, allowed the detention of illegal aliens prospectively associated with the Arab Muslim hijackers and al Qaeda until the FBI proved otherwise.⁵⁶ Considering the relationship between the Arab Muslim terrorists and the attacks, Justice Kennedy concluded that Ashcroft and Mueller's actions after September 11th in detaining Iqbal and other men of Middle Eastern descent could not plausibly result from discrimination.⁵⁷

The majority further indicated that regardless of plausibility, Iqbal failed to plead that Ashcroft and Mueller acted with the intent to discriminate against him and other Arab Muslim men.⁵⁸ Because his complaint alleged that Ashcroft and Mueller's *subordinates* prejudicially detained him, and that Ashcroft and Mueller merely allowed the ADMAX SHU placements, the Court held that Iqbal failed to show his entitlement to relief from Ashcroft and Mueller.⁵⁹

After eliminating the complaint's legal conclusion allegations and ruling the assertion of discrimination implausible, Justice Kennedy concluded that Iqbal was not entitled to relief from Ashcroft and Mueller pursuant to Rule 8(a)(2).⁶⁰ In doing so, the Court rejected Iqbal's three arguments to the contrary.⁶¹ First,

55. *Id.*

56. *Id.*

57. *Id.* at 1951-52. The majority reasoned as follows:

It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. . . . [T]he arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that 'obvious alternative explanation' for the arrests . . . and the purposeful, invidious discrimination [Iqbal] asks us to infer, discrimination is not a plausible conclusion.

Id. (citing *Twombly*, 550 U.S. at 567).

58. *Iqbal*, 129 S. Ct. at 1952. Justice Kennedy ruled that Iqbal's complaint failed to plead "any factual allegation sufficient to plausibly suggest [Ashcroft and Mueller]'s discriminatory state of mind." *Id.*

59. *Id.* The Court stated that "[a]ll [Iqbal's complaint] plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.*

60. *Id.* Justice Kennedy remarked that, although Iqbal's complaint was insufficient for recovery from Ashcroft and Mueller, the Court made no ruling on the sufficiency of the complaint against other defendants not before the Court who possibly engaged in "serious official misconduct." *Id.*

61. *Id.* at 1952.

Iqbal proposed that the Court's decision in *Twombly* applied only to antitrust pleadings.⁶² The majority refused to constrain *Twombly* to antitrust litigation.⁶³ Justice Kennedy reasoned that because *Twombly* interpreted Rule 8, Rule 1 of the Federal Rules of Civil Procedure necessarily mandates that *Twombly* must apply to every complaint filed in a civil action.⁶⁴

Ashcroft and Mueller initially raised qualified immunity as a defense, and as a result, the Second Circuit assured that discovery against both Ashcroft and Mueller would be limited.⁶⁵ Consequently, Iqbal argued that *Twombly*'s interpretation of Rule 8 should be moderated proportionately to the limitations placed on discovery.⁶⁶ Justice Kennedy explained that in *Twombly*, the Court rejected this argument, as discovery limitations are not relevant to granting or denying a motion to dismiss a complaint for failure to state a claim on which relief may be granted.⁶⁷ As a policy consideration, the Court noted that Ashcroft and Mueller could raise the qualified immunity defense to continue their official duties and avoid delay of their work by participating in complete discovery.⁶⁸

Iqbal's final argument contended that Rule 9 of the Federal Rules of Civil Procedure permitted his complaint to plead generally Ashcroft and Mueller's prejudicial purpose.⁶⁹ He argued that Ashcroft and Mueller discriminated against him because of his religion, race, and/or ethnicity, and that he was entitled to plead the allegation as stated.⁷⁰ The majority recognized that although Rule 9 may allow, in some cases, plaintiffs to plead certain elements of a cause of action generally, it granted Iqbal no such right.⁷¹ Instead, the Court decreed that Rule 9 merely relieved

62. *Id.* at 1953.

63. *Iqbal*, 129 S. Ct. at 1953.

64. *Id.* The opinion clarified that Rule 1 applies to "all civil actions and proceedings in the United States district courts," so an interpretation of Rule 8 necessarily applies to all types of civil actions, not just antitrust litigation, as in *Twombly*. *Id.* (quoting FED. R. CIV. P. 1).

65. *Id.* at 1953-54.

66. *Id.* at 1953. The Court called this the "careful-case-management" approach, which it rejected in *Twombly*. *Id.* (citing *Twombly*, 550 U.S. at 559).

67. *Id.* at 1953 (citing *Twombly*, 550 U.S. at 559).

68. *Iqbal*, 129 S. Ct. at 1953.

69. *Id.* at 1954. Rule 9(b) allows "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." FED. R. CIV. P. 9(b).

70. *Iqbal*, 129 S. Ct. at 1954. Iqbal alleged that Ashcroft and Mueller "discriminated against him 'on account of [his] religion, race, and/or national origin and for no legitimate penological interest.'" *Id.* (citing Complaint, *supra* note 6, para. 96).

71. *Id.* at 1954. The Court explained that:

Iqbal from pleading at a heightened level, but did not allow him to state his allegations in the form of legal conclusions.⁷² After declaring Iqbal's complaint deficient, the majority opinion concluded by reversing the order denying the motion to dismiss and remanding to the Second Circuit.⁷³

B. Justice Souter's Dissent

A dissenting Justice Souter argued that the majority eliminated *Bivens's* theory of supervisory liability and improperly exploited *Twombly*.⁷⁴ The dissenting opinion began by dissecting the issues presented in Ashcroft and Mueller's petition for certiorari.⁷⁵ Regarding the first issue, Justice Souter noted that Ashcroft and Mueller chose to inquire about the sufficiency of Iqbal's complaint, instead of their supervisory liability under *Bivens*.⁷⁶ With respect to the second issue, the dissent observed that Ashcroft and Mueller questioned whether they could be liable on the grounds of constructive notice of subordinate prejudice, even though Iqbal in no way pled that Ashcroft and Mueller had constructive notice.⁷⁷ Justice Souter emphasized that both questions presented by Ashcroft and Mueller conceded that supervisory liability may be asserted under *Bivens*.⁷⁸ Moreover, the dissent stated that al-

[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context. . . . Rule 8 does not empower [Iqbal] to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss.

Id.

72. *Id.*

73. *Id.* The opinion stated that the Second Circuit could choose to remand to the U.S. District Court for the Eastern District of New York, where Iqbal could request to amend the complaint. *Id.*

74. *Id.* at 1954-55 (Souter, J., dissenting). Justices Stevens, Ginsburg, and Breyer joined the dissenting opinion. *Id.*

75. *Iqbal*, 129 S. Ct. at 1955.

76. *Id.* at 1956. The first issue, which pertained to pleading, asked the Court "[w]hether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*." *Id.* at 1955 (citing Petition for Writ of Certiorari at I, *Iqbal*, 129 S. Ct. 1937, (No. 07-1015), 2008 WL 336225 [hereinafter Petition]).

77. *Id.* at 1956. The second issue, which pertained to liability, asked the Court "[w]hether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." *Id.* (citing Petition, *supra* note 76, at II). Justice Souter pointed out that "[t]his was an odd question to pose, since Iqbal has never claimed that Ashcroft and Mueller are liable on a constructive notice theory." *Id.*

78. *Id.*

though the two issues neither requested a determination of the elements of supervisory liability or its scope, the majority decided both anyway.⁷⁹

The dissent stressed the inappropriate nature of the majority's discussion of supervisory liability scope for three reasons.⁸⁰ Foremost, Justice Souter explained that Ashcroft and Mueller already agreed that supervisory liability under *Bivens* applies when a superior recognizes and disregards discrimination by their subordinates.⁸¹ This test, argued the dissent, should be the standard for Iqbal to prove *Bivens* supervisory liability.⁸²

Second, Justice Souter opined that the parties neither briefed nor argued the scope and elements of supervisory liability because Ashcroft and Mueller conceded its possibility.⁸³ Justice Souter adamantly disapproved of the majority's decision dismissing supervisory liability without briefing or oral argument on the issue.⁸⁴

Third, the dissent accentuated that Iqbal never had an opportunity to argue the issue of supervisory liability.⁸⁵ The dissenting opinion identified Iqbal's reliance on the concession as warranted and its dismissal as unjust.⁸⁶ Justice Souter highlighted the significance of the Court's dismissal of supervisory liability⁸⁷ and its missteps in doing so without briefs and argument.⁸⁸ The dissenters also expressed their amazement at the majority's denouncement of supervisory liability when, without discussing Iqbal's al-

79. *Id.* The dissent indicated that "[w]ithout acknowledging the parties' agreement as to the standard of supervisory liability, the Court asserts that it must *sua sponte* decide the scope of supervisory liability here." *Id.*

80. *Iqbal*, 129 S. Ct. at 1956-57 (Souter, J., dissenting).

81. *Id.* at 1957.

82. *Id.* The dissent additionally noted that the Court "do[es] not normally override a party's concession." *Id.* (citing *United States v. Int'l Bus. Mach. Corp.*, 517 U.S. 843, 855 (1996)).

83. *Id.* at 1957.

84. *Id.* Justice Souter explained that he "[is] unsure what the general test for supervisory liability should be, and in the absence of briefing and argument [he is] in no position to choose or devise one." *Id.* at 1958.

85. *Iqbal*, 129 S. Ct. at 1957 (Souter, J., dissenting).

86. *Id.* The dissent remarked that "the Court's approach is most unfair to Iqbal," because "[h]e was entitled to rely on Ashcroft and Mueller's concession," and that "[b]y overriding that concession, the Court denies Iqbal a fair chance to be heard on the question." *Id.*

87. *Id.* Justice Souter exclaimed, "Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely." *Id.*

88. *Id.* at 1958. The dissent first noted that the "dichotomy" of "respondeat superior . . . or no supervisory liability at all . . . is false." *Id.* It next listed cases from different circuits that discuss the differences between respondeat superior and supervisory liability. *Id.*

legations, it dismissed the supervisory liability claims as legal conclusions.⁸⁹

The second section of the dissent argued that Iqbal's complaint met the standard of Rule 8(a)(2).⁹⁰ Justice Souter found that Iqbal's allegations fulfilled *Twombly's* plausibility standard, as his complaint contended that Ashcroft and Mueller not only recognized and acquiesced to their employees' prejudice, but also constructed the policy to detain Arab Muslim men based on their religion and national origin.⁹¹ In disagreeing with Ashcroft and Mueller's understanding and the majority's application of *Twombly's* plausibility standard, Justice Souter emphasized that *Twombly* mandates a court to assume the truth of every accusation in a complaint, regardless of a judge's own uncertainties.⁹²

The dissent also disagreed that Iqbal's allegations were legal conclusions.⁹³ According to the dissent, Iqbal's complaint met *Twombly's* plausibility standard by claiming ethnic and religious discrimination and/or unconcern by Ashcroft and Mueller for such discrimination.⁹⁴ Justice Souter agreed that the only two allegations considered by the majority did not sufficiently establish Iqbal's right to relief and that the policies implemented by Ashcroft and Mueller to prevent additional terrorist attacks negatively impacted Arab Muslim men.⁹⁵

But, Justice Souter argued, Iqbal's assertions—catalogued by the majority as legal conclusions—must be viewed in relation to

89. *Id.*

90. *Iqbal*, 129 S. Ct. at 1958 (Souter, J., dissenting).

91. *Id.* at 1959. The dissent concluded that:

The complaint thus alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller [sic] affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.

Id.

92. *Id.* Justice Souter pointed out that "[t]he sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiffs' recent trip to Pluto, or experiences in time travel. That is not what we have here." *Id.*

93. *Id.* at 1960.

94. *Id.* The dissenters believed that "Iqbal's complaint . . . contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (citing *Twombly*, 550 U.S. at 570).

95. *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting) (agreeing that "Ashcroft and Mueller 'sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity' . . . produc[ing] 'a disparate, incidental impact on Arab Muslims,'" and that "the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination").

other specific facts set forth in the complaint.⁹⁶ The dissent explained that the complaint made no legal conclusions because Iqbal's specific allegations supported his broader claims.⁹⁷ Justice Souter concluded by expressing confusion and concern as to the Court's decision to label certain allegations conclusory and others not.⁹⁸

C. Justice Breyer's Dissent

Justice Breyer filed an additional dissent.⁹⁹ In it, he flatly disagreed with the majority's application of *Twombly*.¹⁰⁰ He explained that the qualified immunity defense and discovery limitations sufficiently shielded both Ashcroft and Mueller in their official duties as government officials from superfluous legal proceedings and any interpretation of *Twombly* was unwarranted.¹⁰¹

96. *Id.* at 1961. Justice Souter elucidated that "[v]iewed in light of these subsidiary allegations, the allegations singled out by the majority as 'conclusory' are no such thing." *Id.*

97. *Id.* at 1960-61. For example, the dissent listed the subsidiary claim that "the Chief of the FBI's International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI's New York Field Office implemented a policy that discriminated against Arab Muslim men, including Iqbal, solely on account of their race, religion, or national origin." *Id.* at 1960. The dissent referred to, but did not quote, a section of Iqbal's complaint describing subordinate FBI agents discriminatorily detaining Arab Muslim men in the MDC's ADMAX SHU. *Id.* at 1960-61 (citing Complaint, *supra* note 6, paras. 47-53).

98. *Id.* at 1960-61. The dissent stated that the allegation accepted as true "makes two points: (1) after September 11, the FBI held certain detainees in highly restrictive conditions, and (2) Ashcroft and Mueller discussed and approved these conditions." *Id.* at 1961. The dissenters questioned why "these allegations are not conclusory, [but] . . . the majority deems it merely conclusory when Iqbal alleges that" (1) the FBI made "high interest" classifications based on ethnicity and religion, not on "evidence . . . supporting terrorist activity," and (2) that "Ashcroft and Mueller 'knew of, condoned, and willfully and maliciously agreed' to that discrimination." *Id.* (citing Complaint, *supra* note 6, paras. 48-50, 96).

99. *Id.* at 1961 (Breyer, J., dissenting). Justice Breyer noted that he concurs with Justice Souter's dissent. *Id.*

100. *Iqbal*, 129 S. Ct. at 1961 (Breyer, J., dissenting). Justice Breyer explained that he "believe[s] it important to prevent unwarranted litigation from interfering with 'the proper execution of the work of the Government' . . . [b]ut . . . cannot find in that need adequate justification for the Court's interpretation of [*Twombly*]." *Id.*

101. *Id.*

IV. THE LEGISLATION AND PRECEDENT LEADING TO *IQBAL*A. *The Federal Rules of Civil Procedure and Dioguardi v. Durning*

The United States implemented the Federal Rules of Civil Procedure in 1938.¹⁰² The drafters of the Rules sought to escape the demanding intricacies of code pleading in favor of an amenable and versatile method of pleading.¹⁰³ The Rules, unlike the codes, do not require that plaintiffs put forth a certain amount of fact equal to a cause of action.¹⁰⁴ As a result, the Rules require that a complaint consist only of "a short and plain statement of the claim showing that the pleader is entitled to relief."¹⁰⁵

Judge Charles E. Clark, a major architect of the Rules, ruled on the sufficiency of a complaint in the 1944 dispute of *Dioguardi v. Durning*,¹⁰⁶ a case later adopted by the United States Supreme Court in *Conley v. Gibson*.¹⁰⁷ In *Dioguardi*, the defendant, a customs collector, refused to deliver plaintiff's inventory for failure to pay certain fees owed.¹⁰⁸ A year later, the defendant sold the plaintiff's products at an auction.¹⁰⁹ The plaintiff then filed a complaint, which specifically alleged that the defendant "sold [his] merchandise to another bidder with [plaintiff's bidding] price of \$110, and not [defendant's asking] price of \$120," and "that three weeks before the sale, two cases [of plaintiff's inventory] disappeared."¹¹⁰

102. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004 (3d ed. 2004).

103. *Id.* § 1216. Code pleading was "[a] procedural system requiring that the pleader allege merely the facts of the case giving rise to the claim, not the legal conclusions necessary to sustain the claim." BLACK'S LAW DICTIONARY, *supra* note 23, at 1271. The original "code," adopted in New York and created by David Dudley Field, obliged plaintiffs to give "statement[s] of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." *Twombly*, 550 U.S. at 574. The creators of the Federal Rules of Civil procedure sought to remedy the codes' "virtua[ly] impossib[ility] of . . . distinguish[ing] among 'ultimate facts,' 'evidence,' and 'conclusions'" in drafting Rule 8. *Id.* at 574-75 (quoting Weinstein & Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520-521 (1957)).

104. 5 WRIGHT & MILLER, *supra* note 102, § 1216.

105. FED. R. CIV. P. 8(a)(2).

106. 139 F.2d 774 (2d Cir. 1944); *see also* 5 WRIGHT & MILLER, *supra* note 102, § 1220.

107. *Conley*, 355 U.S. 41, *abrogated by Twombly*, 550 U.S. 544.

108. *Dioguardi*, 139 F.2d at 774.

109. *Id.*

110. *Id.*

The district court dismissed the complaint for failure to state a claim upon which relief may be granted.¹¹¹ Writing for the Second Circuit, Judge Clark reversed the dismissal and declared the complaint adequate under the newly enacted Rule 8(a).¹¹² Even though inartfully pled, the Second Circuit found the claim for relief sufficient as it nevertheless asserted that the defendant sold and disposed of the plaintiff's merchandise and notified the defendant of the plaintiff's claims against him.¹¹³

B. The Fifty-Year-Reign of the "No Set of Facts" Rule: Conley v. Gibson

In 1957, the United States Supreme Court adopted "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" in *Conley v. Gibson*.¹¹⁴ In *Conley*, African-American railroad employees brought suit against their union for failing to represent them after their employer removed them from their positions and replaced them with Caucasian employees.¹¹⁵ The union moved to dismiss for failure to state a claim upon which relief may be granted.¹¹⁶ The district and appellate courts ignored the failure to state a claim argument and held that only the National Railroad Adjustment Board had jurisdiction to hear the case and dismissed the complaint.¹¹⁷

The Supreme Court reversed the dismissal for lack of jurisdiction and instead assessed the adequacy of the plaintiff's complaint.¹¹⁸ Justice Black explained that under the Rules, a com-

111. *Id.* The district court allowed the plaintiff to amend his complaint. *Id.* at 775. After plaintiff amended his complaint, the district court again dismissed for failure to state a claim. *Id.*

112. *Id.* at 775 (explaining that "[u]nder the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief'").

113. *Dioguardi*, 139 F.2d at 775. The court noted that it "appears . . . that [plaintiff] was actually the first bidder at the price for which they were sold, and hence was entitled to the merchandise." *Id.*

114. 355 U.S. at 45-46. The Court cited *Diogaurdi* in a footnote. *Id.* at 46 n.5.

115. *Id.* at 43. A contract between the union and the employer existed and stated that the employer would neither terminate nor demote union member employees. *Id.* The Railway Labor Act mandated that the union represent the railroad workers. *Id.*

116. *Id.* The union gave three reasons for the complaint to be dismissed: (1) lack of jurisdiction, (2) failure to join a third necessary party, and (3) failure to state a claim. *Id.*

117. *Id.* at 43-44.

118. *Id.* at 45.

plaint need only notify the defendant of the plaintiffs allegations¹¹⁹ and the "no set of facts" rule mandated that a complaint must survive a motion to dismiss absent the impossibility of plaintiffs presentation of any fact in favor of the claim.¹²⁰

The complaint asserted that the employer fired and demoted forty-five African American employees and then filled the positions with Caucasian workers.¹²¹ It continued in alleging that, when prompted by the discharged and demoted union-member employees, the union failed to take action on their behalf.¹²² The Court held that the complaint satisfied Rule 8(a) by pleading facts that gave notice to the union of the allegations against them¹²³ and that if confirmed would establish the union's breach of contract and violation of the Railway Labor Act.¹²⁴

C. *The Evolution of Rule 8: Papasan, Leatherman, and Swierkiewicz*

Thirty years later in *Papasan v. Allain*,¹²⁵ the Court ruled that although Rule 8 does not require an exhaustive presentation of factual matters in a complaint, a plaintiff may not assert and rely on mere legal conclusions in a claim for relief.¹²⁶ In *Papasan*, the plaintiffs, who were Native American school officials, pled that funding disparities resulting from the actions of defendant state officials "deprived [Native American] schoolchildren of a minimally adequate level of education."¹²⁷

Writing for the majority, Justice White clarified that unlike contentions of fact,¹²⁸ legal conclusions—even when styled as fact—

119. *Conley*, 355 U.S. at 47. The Court explained that under the Federal Rules of Civil Procedure, a plaintiff need not "set out in detail the facts upon which he bases his claim. . . . [A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.*

120. *Id.* at 45-46. Justice Black wrote that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

121. *Id.* at 43 (stating that the complaint "allege[d] that the Union had failed in general to represent [African-American] employees equally and in good faith").

122. *Id.*

123. *Id.* at 48 (holding that "we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis").

124. *Conley*, 355 U.S. at 46. Justice Black explained that "[i]f these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit." *Id.*

125. 478 U.S. 265 (1986).

126. *Papasan*, 478 U.S. at 286.

127. *Id.* at 274.

128. *Id.* at 283 (citing *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1957)).

are not entitled to the assumption of truth.¹²⁹ The *Papasan* Court noted that the complaint failed to plead *any* factual matter relating to the students' lack of education.¹³⁰ For example, the majority remarked that the plaintiffs even failed to assert that the students received a substandard basic education.¹³¹ Because the plaintiffs' claim for relief solely relied on a legal conclusion, the Court dismissed the "minimally adequate education" deprivation claim.¹³²

Conflicts arose between the circuits regarding the validity of "heightened pleading standard[s]" requiring more than a short and plain statement under Rule 8.¹³³ In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,¹³⁴ plaintiffs brought suit against the defendants, narcotics agents, after the execution of search warrants by defendants.¹³⁵ The Fifth Circuit demanded that to satisfy the higher pleading standard for municipal liability, a plaintiff must not only plead specific facts indicating their cause of action, but also indicate why the defendants' immunity defense is untenable.¹³⁶ Both the district and appellate court dismissed plaintiffs' claim for failing to meet the stricter pleading requirement.¹³⁷

Chief Justice Rehnquist, writing for a unanimous Court, articulated that the Fifth Circuit's stringent pleading standard directly conflicted with Rule 8 and notice pleading.¹³⁸ The opinion stressed that Rule 8 simply requires "a short and plain statement of the claim," and that Rule 9(b) provides for additional pleading re-

129. *Id.* at 286 (explaining that "for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation").

130. *Id.*

131. *Papasan*, 478 U.S. at 286. The majority remarked that the plaintiffs "do not allege that schoolchildren . . . are not taught to read or write; they do not allege that they receive no instruction on even the educational basics." *Id.*

132. *Id.*

133. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). Chief Justice Rehnquist stated the issue as "whether a federal court may apply a 'heightened pleading standard'—more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure—in civil rights cases alleging municipal liability under . . . 42 U.S.C. § 1983." *Leatherman*, 507 U.S. at 164.

134. *Leatherman*, 507 U.S. 163.

135. *Id.* at 164-65. Officers entered plaintiffs' homes on the suspicion of narcotics manufacturing. *Id.* at 165. The complaint specifically alleged that officers assaulted one individual after execution of the search warrant on his home and that officers killed the dogs of another individual whose home they entered. *Id.*

136. *Id.* at 167 (quoting *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)).

137. *Id.* at 165.

138. *Id.* at 168 (elucidating that "it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules").

quirements in fraud and mistake allegations only.¹³⁹ The Court concluded by reversing the dismissal and reaffirming that complaints must give notice to the defendant of the allegations against them and rejecting the applied heightened pleading standard.¹⁴⁰

In the 2002 case of *Swierkiewicz v. Sorema*,¹⁴¹ the Court clarified that a complaint need not plead every element to a prima facie case in employment discrimination to survive a motion to dismiss.¹⁴² In *Swierkiewicz*, a Hungarian plaintiff alleged that his employer's chief executive officer violated the Civil Rights Act of 1964¹⁴³ and the Age Discrimination in Employment Act of 1967¹⁴⁴ by demoting him and, after filing grievances, discharging him and filling his position with a younger, less experienced employee.¹⁴⁵ The district court, later affirmed by the Second Circuit, dismissed the complaint for failure to plead the elements in a prima facie case of employment discrimination.¹⁴⁶

The Supreme Court reversed the decisions of the district court and Second Circuit.¹⁴⁷ "The prima facie case," emphasized the Court, "is an evidentiary standard, not a pleading requirement."¹⁴⁸ Justice Thomas, writing for the unanimous Court, made it clear that the requirement of the prima facie case applies only to the evidence and the burden of proof necessary to allow the Court to

139. *Leatherman*, 507 U.S. at 168. Chief Justice Rehnquist wrote that "the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius*." *Id.* *Expressio unius est exclusio alterius* is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY, *supra* note 23, at 661.

140. *Leatherman*, 507 U.S. at 168-69.

141. 534 U.S. 506 (2002).

142. *Swierkiewicz*, 534 U.S. at 512; see generally 5 WRIGHT & MILLER, *supra* note 102, § 1216 (stating that "the Supreme Court [in *Swierkiewicz*] suggests that at least in some circumstances all the elements of a prima facie case need not be pled").

143. *Id.* at 509 (citing 42 U.S.C. § 2000e *et seq.* (2006)).

144. *Id.* (citing 29 U.S.C. § 621 *et seq.* (2006)).

145. *Id.* at 508. The complaint alleged that the CEO, a Frenchman, filled the Hungarian plaintiff's position with another Frenchman. *Id.* The plaintiff requested a severance package after the demotion, at which point the employer informed the plaintiff he could quit or be terminated. *Id.* at 509.

146. *Id.* at 509. The Court listed the following elements in the prima facie case for employment discrimination: (1) plaintiff's status in a protected group of persons; (2) aptitude for the position denied; (3) "adverse employment action"; and (4) other evidence allowing the "inference of discrimination." *Id.* at 510. The Second Circuit's prima facie case standard developed from the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Swierkiewicz*, 534 U.S. at 509.

147. *Swierkiewicz*, 534 U.S. at 515.

148. *Id.* at 510.

infer discrimination.¹⁴⁹ The Court stressed that using the prima facie case as the absolute test for Rule 8 compliance directly clashed with Rule 8(a)(2).¹⁵⁰

Justice Thomas declared the plaintiff's complaint adequate because it pled sufficient factual matter to notify the defendant of the alleged claims.¹⁵¹ The complaint specifically asserted that the defendant fired the plaintiff based on his Hungarian national origin and his age, providing accounts of incidents prior to termination, pertinent dates, and the national origin and ages of other employees.¹⁵² The Court reversed the dismissal, reiterating that the Rules fail to present standards for heightened pleading, and even though a plaintiff's recovery based solely on a reading of her complaint may seem far-fetched, Rule 8 does not require pleading of the prima-facie case.¹⁵³

D. *The "Retirement" of Conley: Bell Atlantic Corp. v. Twombly*

Fifty years after deciding *Conley*, the Court overruled its "no set of facts" test in *Bell Atlantic Corp. v. Twombly*.¹⁵⁴ In *Twombly*, plaintiff's complaint alleged two violations of section 1 of the Sherman Act:¹⁵⁵ first, that defendant companies "engaged in parallel conduct' . . . to inhibit the growth of upstart" companies,¹⁵⁶ and second, that the defendant companies "agree[d] . . . to refrain

149. *Id.* (holding that "the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination").

150. *Id.* at 512. Justice Thomas explained that "[t]he precise requirements of a prima facie case can vary depending upon the context and were 'never intended to be rigid, mechanized, or ritualistic.'" *Id.*

151. *Id.* at 514.

152. *Id.*

153. *Swierkiewicz*, 534 U.S. at 515 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)) (explaining that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits"). The Court emphasized that "it may appear on the face of the pleadings that a recovery is very remote and unlikely, that is not the test" for adequacy of a complaint. *Id.* at 515. The Court also explained that the only method to procure "greater specificity for particular claims is . . . by the process of amending the Federal Rules, and not by judicial interpretation." *Id.* (citing *Leatherman*, 507 U.S. at 168).

154. *Twombly*, 550 U.S. 544. Plaintiffs brought a potential anti-trust class action against telecommunication companies. *Id.* at 550.

155. *Id.* at 548 (citing 15 U.S.C. § 1 (2006)).

156. *Id.* at 550. The plaintiff alleged that after a 1996 act forced the then-monopoly companies to restructure, the companies acted similarly and by agreement to continue providing services in a manner inconsistent with the act and unfairly to consumers. *Id.* The complaint asserted that the companies "ma[de] unfair agreements with [upstart companies] for access to [defendants'] networks, provid[ed] inferior connections to the networks, overcharg[ed], and bill[ed] in ways designed to sabotage the [upstart companies] relations with their own customers." *Id.*

from competing against one another.”¹⁵⁷ The district court dismissed plaintiffs’ complaint as inadequate,¹⁵⁸ while the Second Circuit reversed the dismissal.¹⁵⁹ Justice Souter, writing for the majority, reversed the Second Circuit and remanded.¹⁶⁰

1. Justice Souter’s Majority Opinion

The Court emphasized that a complaint may not rely solely on legal conclusions,¹⁶¹ nullified the holding in *Conley* for a plausibility standard,¹⁶² and found plaintiffs’ complaint inadequate on the grounds of implausibility.¹⁶³ *Twombly* established a “plausibility”

157. *Id.* at 551. The specific allegations from the complaint included “failure ‘to meaningfully pursue’ ‘attractive business opportunities’ in contiguous markets where they possessed ‘substantial competitive advantages’” and one CEO’s statement “that competing in the territory of another [monopoly company] ‘might be a good way to turn a quick dollar but that doesn’t make it right.’” *Id.* (quoting Consol. Amended Class Action Complaint paras. 40-42, *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003), 2003 WL 25629874 [hereinafter Class Action Complaint]). Justice Souter pointed out the complaint’s fundamental claims:

In the absence of any meaningful competition between [defendants] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [other companies] within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that the [defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.

Id. (quoting Class Action Complaint, *supra*, para. 51).

158. *Id.* at 552. The district court ruled that “allegations of parallel business conduct, taken alone, do not state a claim under § 1” and failing to “allege facts suggesting that refraining from competing . . . was contrary to [defendants’] apparent economic interests . . . [and] does not raise an inference that the [defendants’] actions were the result of conspiracy.” *Id.* (citations omitted).

159. *Twombly*, 550 U.S. at 553. The Second Circuit believed that “plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.” *Id.* (emphasis in original). Instead, the Second Circuit applied *Conley*: “[T]o rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.” *Id.*

160. *Id.* at 570.

161. *Id.* at 555. The majority explained that:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action will not do.

Id. (citations omitted).

162. *Id.* at 561. Justice Souter remarked that “*Conley*’s ‘no set of facts’ language has been questioned, criticized, and explained away long enough.” *Id.* at 562.

163. *Id.* at 564. The majority took issue with *Conley*’s no-set-of-facts standard on the grounds that “any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings.” *Id.* at 561. *Conley* also, argued

standard for complaints that requires “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”¹⁶⁴ Plausibility still requires a court to assume a complaint’s allegations as true, even if the judge believes it unlikely that the pleader will be able to produce factual proof, and that recovery is improbable.¹⁶⁵

The Court found the complaint in *Twombly* insufficient for alleging only legal conclusions¹⁶⁶ and that such legal conclusions additionally failed to notify the defendants of the specific claims against them.¹⁶⁷ Justice Souter reinforced that plaintiffs need not use detailed factual pleading,¹⁶⁸ but even after assuming their allegations to be true, the complaint did not meet the plausibility standard and, as a result, could not survive the motion to dismiss.¹⁶⁹

the majority, allows the pleading of legal conclusions. *Id.* (explaining that *Conley* allows “a wholly conclusory statement of [a] claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of undisclosed facts’ to support recovery”). *Id.* Justice Souter then pronounced that *Conley* may not *establish* the lowest possible level of pleading sufficiency, but instead *provides* the “breadth of opportunity to prove what an adequate complaint claims.” *Id.* at 563.

164. *Twombly*, 550 U.S. at 556. The Court “h[eld] that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.” *Id.* (clarifying that “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement”).

165. *Id.* at 556. The majority requires that judges assume a plaintiff’s allegations as true, “even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” *Id.*

166. *Id.* at 564. Justice Souter wrote:

[T]he complaint leaves no doubt that plaintiffs rest their §1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement . . . Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations.”

Id.

167. *Id.* at 565 n.10. The majority emphasized that “the complaint here furnishes no clue as to which of the [defendants] . . . supposedly agreed, or when and where the illicit agreement took place. . . . [A] defendant seeking to respond to plaintiffs’ conclusory allegations . . . would have little idea where to begin.” *Id.* The majority argued that the complaint manifested only a “natural, unilateral reaction” after the 1996 act forcing the monopoly defendants to reorganize. *Id.* at 566. The opinion expressed that “there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway.” *Id.*

168. *Id.* at 570 (holding that “only enough facts to state a claim to relief that is plausible on its face” are necessary).

169. *Twombly*, 550 U.S. at 570

2. *Justice Stevens' Dissent*

Justice Stevens sharply dissented.¹⁷⁰ He contradicted Justice Souter's remarks about the legal profession's puzzlement over *Conley*, expressing that, until the majority in *Twombly*, no member of the Court manifested such confusion.¹⁷¹ The dissent argued the sufficiency of the no-set-of-facts rule¹⁷² and that the majority annulled *Conley* over anxieties relating to the high cost of disputes arising under the Sherman Act.¹⁷³ Justice Stevens asserted the adequacy of the complaint¹⁷⁴ and that the majority's actions circumvented the established rule making process.¹⁷⁵

V. *IQBAL*: A CONFUSING, INCOMPLETE, AND OPPORTUNISTIC OPINION

The majority opinion in *Iqbal* misapplied *Twombly* to achieve a result favorable to government officials which impulsively abolishes supervisory liability under *Bivens*, and effectively eliminates pure notice pleading. As a result, plaintiffs may no longer rely on their complaint's ability to notify a defendant of a pending action. The question of how much factual matter makes a complaint "plausible," however, has yet to be determined.

A. *The Now-Impenetrable Motion to Dismiss*

The Court, in its elaborations on *Bivens* supervisory liability and the September 11th attacks, failed to clarify the exactness necessary to defeat a motion to dismiss. The Court recognized that qualified immunity halted discovery as to Ashcroft and Mueller, yet failed to sympathize with *Iqbal* and required that he plead

170. *Id.* at 571 (Stevens, J., dissenting). Justice Ginsburg joined in the dissent, except as to part IV. *Id.* at 570.

171. *Id.* at 578.

172. *Id.* at 571.

173. *Id.* at 577 (expressing that *Conley* only allows for dismissal "when proceeding to discovery or beyond would be futile").

174. *Twombly*, 550 U.S. at 551 (Stevens, J., dissenting). The dissent explained that the "complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners 'entered into a contract, combination or conspiracy to prevent [competition] . . . and have agreed not to compete with one another.'" *Id.* at 571. (citations omitted).

175. *Id.* Justice Stevens also noted that "Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six amici who filed briefs in support of petitioners." *Id.* Justice Stevens lamented that he "would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process—a rule-making process—for revisions of that order."

some additional factual matter.¹⁷⁶ Specifically, Justice Kennedy failed to address exactly *how* Iqbal—absent discovery—would locate the facts required to fulfill the Court’s pleading requirements.¹⁷⁷

Besides the specific impact on Iqbal, potential plaintiffs from all types of civil litigation must now go beyond traditional notice pleading to survive a motion to dismiss.¹⁷⁸ The Court provides guidance to neither Iqbal nor any potential plaintiff. In its overly simple determination that Iqbal’s complaint alleges only legal conclusions, our highest court bamboozles plaintiffs by disregarding fifty years of precedent, the Federal Rules of Civil Procedure, and the possibility that every plaintiff in federal court—whether they once “understood” *Twombly* or not—cannot survive a motion to dismiss because they are bound to whimsical judicial determination of “fact” or “legal conclusion.”

In the two months following *Iqbal*, district courts cited the Court’s opinion in at least 500 rulings.¹⁷⁹ After *Iqbal*, defendants may simply move to dismiss for plaintiffs’ use of “legal conclusions”—the definition of which seems ever murkier after *Iqbal*. Based on the Court’s broad and confusing finding of such conclusions in *Iqbal* (even with the use of specific facts and allegations) how can any court, in any jurisdiction, be overturned on appeal?¹⁸⁰ How can wronged plaintiffs with worthy claims afford such a process? *Iqbal* limits plaintiffs’ entry to the federal courts, by making it nearly impossible to survive a motion to dismiss, almost cer-

176. *Iqbal*, 129 S. Ct. at 1953.

177. David G. Savage, writer for the American Bar Association Journal, noted that “[i]t is not clear how a former prisoner could show evidence of Ashcroft’s state of mind without being able to question officials and inspect documents.” David G. Savage, *Narrowing the Courthouse Door: High Court Makes it Tougher to Get Past the Pleading Stage*, 95-JUL A.B.A. J. 22, 23 (2009). Mr. Savage referred to the amicus brief of Harold Koh, former dean of Yale Law School, which “calls this the catch-22 approach to civil litigation. That means, says Koh, plaintiffs are told they must include certain facts in the pleading that can be obtained only through discovery.” *Id.*

178. *Id.* at 22. Mr. Savage’s article indicates that “[n]o one seems to doubt that the [C]ourt wants to make it harder for plaintiffs to get inside the door.” *Id.*

179. Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 20, 2009, http://www.nytimes.com/2009/07/21/us/21bar.html?_r=1.

180. Tony Mauro, writer for The National Law Journal, noted that the “Court gave corporate defendants a gift that keeps on giving: the *Iqbal* decision, which has made it easier than ever for defendants to shut down lawsuits before they get to the costly discovery stage.” Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court’s ‘Iqbal’ Ruling*, NAT’L L. J., September 21, 2009, available at <http://www.law.com/jsp/nlj/indexarticle.jsp?id=1202433931370>.

tainly requiring an appeal, and increasing the already prohibitive costs of litigation.¹⁸¹

Justice Ginsburg, who joined Justice Souter's dissent, commented that the "Court's majority [in *Iqbal*] messed up the federal rules."¹⁸² Senator Arlen Specter has even introduced legislation to essentially undo the holdings of *Twombly* and *Iqbal*, and reinstate *Conley*.¹⁸³ On behalf of worthy plaintiffs, Specter decried *Iqbal* for its inevitable denial of admission to the federal judicial system, as well as the accompanying appropriate remedy.¹⁸⁴

B. The Court Avoids the Qualified Immunity Defense . . . But Strongly Favors it Anyway

Justice Kennedy circumvented the issue of whether the defense of qualified immunity shields Ashcroft and Mueller from post-September 11th litigation, but used charged language that seemed to favor the protection of government officials. For example, Justice Kennedy described the arrests of Arab Muslim men as merely "a disparate, incidental impact" of the attacks¹⁸⁵ and named Ashcroft and Mueller as "the Nation's top law enforcement officers."¹⁸⁶ The Court recognized that *Iqbal*'s allegations, assuming their truth, *did* support a finding of discrimination, but quickly determined that as a result of the September 11th attacks, Ashcroft and Mueller could not possibly have acted with prejudice.¹⁸⁷

The majority concluded that *Iqbal* made only *one* plausible implication in his complaint: that Ashcroft and Mueller implemented a policy to imprison supposed terrorists in the ADMAX SHU pending proof of non-involvement in terrorist activity.¹⁸⁸ The

181. Civil Procedure expert Arthur Miller "see[s] serious problems with democratic values [in *Iqbal*], with access to the courts, [and] with resolution of disputes with a jury of peers." *Id.*

182. Liptak, *supra* note 179.

183. David Ingram, *Specter Proposes Return to Prior Pleading Standard*, NAT'L L. J., July 24, 2009, available at <http://www.law.com/jsp/articlenlj/indexarticle.jsp?.?id=1202432493166>.

184. *Id.* Senator Specter believes the "effect of the Court's actions, will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries." *Id.*

185. *Iqbal*, 129 S. Ct. at 1951.

186. *Id.* at 1952.

187. *Id.* Justice Kennedy stated that more "likely explanations" than prejudice existed for the arrests and treatment of *Iqbal* and other imprisoned Arab-Muslim men. *Id.*

188. *Id.* Justice Kennedy reasoned that "[a]ll [*Iqbal*'s complaint] plausibly suggests is that" Ashcroft and Mueller "sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.*

Court intentionally failed to answer the issue of qualified immunity, yet addressed Ashcroft and Mueller's role in their official duties at length. The conservative majority became judicial legislators in ignoring Rule 8 and designating Iqbal's serious allegations as legal conclusions. This case was not about pleading: at least to the majority, *Iqbal* concerned the protection of Ashcroft and Mueller from post-September 11th litigation, and the Court quite willingly disregarded precedent and the Federal Rules of Civil Procedure to do so.

C. *The Answer to an Un-Asked Question*

Although the Court dismissed the action for pleading insufficiency and not on the grounds of qualified immunity, the majority still managed to eliminate supervisory *Bivens* liability.¹⁸⁹ Whether or not *Bivens* liability may extend to Ashcroft and Mueller was not at issue on appeal, as Ashcroft and Mueller conceded that if they exhibited indifference to the discriminatory actions of their subordinates, they may be liable as superior government officials under *Bivens*.¹⁹⁰ The Court nonetheless held that defendants can only be liable under *Bivens* for their own personal actions.¹⁹¹ The majority's impulsive decision to eliminate *Bivens* applicability—when the parties neither briefed nor argued the issue,¹⁹² and no defendant raised the issue—further implicated the Court's insulation of Ashcroft and Mueller from post-September 11th litigation, even without ruling on qualified immunity.¹⁹³

D. *Uncertainty among the Justices*

Confusion for plaintiffs remains from both the *Twombly* and *Iqbal* opinions. Notably, Justice Souter authored not only the ma-

189. *Id.* at 1956 (Souter, J., dissenting).

190. *Iqbal*, 129 S. Ct. at 1956 (Souter, J., dissenting).

191. *Id.* at 1949 (majority opinion).

192. *Id.* at 1957-58 (Souter, J., dissenting).

193. For example, at oral argument, Chief Justice Roberts suggested that the pleading standard established in *Twombly* is:

affected by the context in which the allegations are made . . . because [in the instant case] we're looking at litigation involving the Attorney General and the Director of FBI in connection with their national security responsibilities . . . there ought to be greater rigor applied to our examination of the complaint.

Transcript of Oral Argument at 37-38, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015). Additionally at oral argument, counsel for Iqbal clarified that the complaint alleged that the FBI held Iqbal and other detainees "solely based on their race, religion, and national origin." *Id.* at 56. "Implausible," retorted Justice Scalia, who believed that according to such a policy, "hundreds of thousands of others" would have been incarcerated. *Id.* at 56.

jority opinion in *Twombly*, but also the dissent in *Iqbal*, which suggests not a clarification of *Twombly* in *Iqbal*, but a disharmony between the sister opinions. A dissenting Justice Souter explained that "plausible," as stated in *Twombly*, need not be interpreted to mean the only possible explanation (as did Justice Kennedy in the majority opinion), but only those claims that exceed logical and rational boundaries.¹⁹⁴ It is bewildering that the author of the *Twombly* opinion—who adamantly disapproved of the *Conley* no set of facts rule—so vigorously dissented from the first case before the Court applying and explaining *Twombly*. How can plausibility under *Twombly* be understood when its majority author dissents from a later opinion applying exactly the same standard?

Perhaps the Court too willingly rejected the *Conley* test and now finds itself undertaking the clarification of current ambiguous pleading standards. Under the recent *Twombly* and *Iqbal* decisions, plaintiffs must avoid the use of legal conclusions—or what may be interpreted as a legal conclusion—by pleading pertinent and illustrative facts. Specifically, the *Twombly* Court noted that the Federal Rules of Civil Procedure's Form 9 remains an adequate complaint and emphasized the important elements of an allegation as place, date, and time.¹⁹⁵ Until the Court further interprets, clarifies, or applies *Iqbal*, plaintiffs should, at the absolute minimum, plead descriptive facts that give notice to a defendant of the place, date, and time of the alleged cause of action.

Carly R. Wilson

194. *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting). Justice Souter clarified that an implausible complaint is "sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel." *Id.*

195. *Twombly*, 550 U.S. at 565 n.10. The Court noted that "the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time." *Id.*